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in the

Supreme Court
of the
United States

OCTOBER TERM 1977

NO. 77-1397

ANITA ABRAMS,

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	3
Question Presented	4
Constitutional and Statutory Provisions Involved	5
Statement of the Case	6
Reasons for Granting the Writ	8
Conclusion	12
Certificate of Service	13

INDEX TO APPENDICES

APPENDIX A. ..... App. 1
APPENDIX B. ..... App. 57
APPENDIX C. ..... App. 81

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The Petitioner, Anita Abrams, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 24, 1978.

OPINION BELOW

The Opinion of the Court of Appeals appears in Appendix "A" hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit was entered on February 24, 1978, affirming, and reversing, in part, the Petitioner's convictions. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a defendant in a criminal prosecution for perjury before a Federal Grand Jury has been denied procedural due process of law guaranteed by the Fifth Amendment to the United States Constitution where the defendant's conviction was predicated upon a finding that the false testimony was material where the Government failed to prove that the allegedly perjurious statements were material to the subject matter inquiry of the Grand Jury, and, further, where the Government failed to prove that said statements tended to impede, mislead or hamper the Grand Jury in its investigation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case sub judice involves the Petitioner's right to due process of law guaranteed by the Fifth Amendment to the United States Constitution; and, the proper construction of 18 U.S.C.A. §1623, both of which appear as Appendix "C" hereto.

STATEMENT OF THE CASE

Petitioner, a legal secretary and bookkeeper, was subpoenaed and ultimately given "use" immunity to testify before a Federal Grand Jury for the Southern District of Florida. The investigation pertained to allegations stemming from insurance claims filed by Petitioner's employer, Attorney James A. Davis, for numerous clients. Petitioner was questioned by the United States Attorney before the Grand Jury about Davis' cost breakdown and disbursements of the proceeds upon the settlement of certain claims by Davis. Petitioner testified, inter alia, that although she took part in the preparation of cost breakdown statements, she had no personal knowledge, information or belief as to the validity of the costs, i.e., whether they were actually incurred for and on behalf of the client in question. Part of Petitioner's testimony is set out in the Appendix to the Fifth Circuit Court of Appeals' Opinion, which is Appendix "A" hereto.

Petitioner was subsequently indicted and charged with three counts of Perjury before the Grand Jury in violation of 18 U.S.C.A. §1623 (Appendix "B").

After a trial by jury, Petitioner was acquitted as to Count I, but was convicted as to Counts II and III of the Indictment and sentenced to eighteen months' imprisonment and a fine of $1,000.00 as to Count II; as to Count III, Petitioner received three years' probation, consecutive to the 18-months sentence. The United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction as to Count II, holding, inter alia, that false testimony is material within the language and meaning of 18 U.S.C.A. §1623 where it is "capable of influencing the tribunal on the issue before it" and that the Government's introduction into evidence of a transcript of Petitioner's Grand Jury testimony was sufficient to prove materiality; Petitioner's conviction as to Count III was reversed by the appellate court due to the trial court's failure to grant Petitioner's Motion for Judgment of Acquittal (Appendix "A").

REASONS FOR GRANTING THE WRIT

There exists a conflict between the Fifth and Eighth Circuit Courts of Appeal as to the meaning of the materiality requirement within the language of Title 18, U.S.C.A. §1623 and the requirement of its proof by the Government. Petitioner's conviction for Perjury, affirmed by the Fifth Circuit, required that "the [Grand Jury] witness' answers were capable of influencing the tribunal on the issue before it, including any matters collateral thereto". *United States v. Abrams,*_____ F.2d_____(5th Circuit Case No. 77-5107, February 21, 1978) (Appendix "A").

This standard is confused even within the Fifth Circuit, where the "capable of influencing" test has been applied correctly to perjury during a trial by jury where the witness' demeanor and credibility is paramount, *United States v. Whimpy,* 531 F.2d 768 (5th Cir. 1976). In Grand Jury proceedings, the furtherance of the investigation is paramount and testimony which is merely *capable* of influencing the jurors is not material, see *United States v. Koonce,* 485 F.2d 374 (8th Cir. 1973). But see *United States v. Damato,* 554 F.2d 1371 (5th Cir. 1977), in which the Fifth Circuit again applied the "capable of influencing" standard while reviewing testimony in a Motion to Suppress hearing.

The Fifth Circuit's test deprives a defendant of procedural due process as it permits a finding of materiality where the Government has merely alleged, but not proved, that the false statement pertains to a Grand Jury proceeding either on a pivotal or peripheral issue. Moreover, this view vitiates the *materiality* requirement of 18 U.S.C.A. §1623, whose purpose appears to be to limit the scope of prosecutions for allegedly perjurious statements.

As stated recently by the Eighth Circuit:

> To allow the perjury statute to be involved where the alleged misstatement relates only to a peripheral matter would unwisely expand the statute's scope. *U.S. v. Lasater,* 535 F.2d 1041, 1049 (8th Cir. 1977).

The Eighth Circuit, beginning with *United States v. Koonce, supra,* holds that perjury before a Grand Jury is material where the false testimony *tends to influence, mislead or hamper the investigation.* In its most recent pronouncement on this question, *United States v. Lasater, supra,* that Circuit has reaffirmed its view. In *Lasater, supra,* the Court held that where there was no showing that the defendant's testimony deterred the prosecutor from further questioning by or before the Grand Jury and, therefore, it did not "tend to impede the grand jury," 535 F.2d at 1048.

The Eighth Circuit's test requires that some *nexus* exists between the testimony and the subject matter of the prosecutor's questioning. This nexus did not exist in *Lasater, supra,* where the defendant's statements, concededly false and clearly within the scope of the Grand Jury's investigation, did not tend to discourage the prosecutor from further questioning. Therefore, the false testimony was not material.

Petitioner contends that, were *Lasater* decided by the Fifth Circuit, the testimony would have been found material because the introduction of the transcript of

the testimony under the Fifth Circuit rule is sufficient to prove that it was capable of influencing the proceeding. Conversely, were Petitioner's case decided under the Eighth Circuit's test, her statements *would not be* material as the Government made no showing that Petitioner's testimony tended to impede the investigation. In short, Petitioner would have been acquitted under the Eighth Circuit rule, but stands convicted under the Fifth Circuit rule.

The Fifth Circuit's interpretation is a broad net which can draw in all statements before a Grand Jury. Any statement by any witness is "capable of influencing the proceeding" to the extent that a witness' demeanor and credibility are observed. If nearly all statements are deemed material, merely by virtue of having been made before the Grand Jury by a witness, then the Fifth Circuit test of materiality is a nullity. On the other hand, the Eighth Circuit's construction limits materiality to statements central to the investigation and which are clearly in reference to a specific line of questioning. This construction fulfills the purpose of the statute by encouraging the voluntary participation of witnesses before a Grand Jury, *United States v. Del Toro,* 513 F.2d 656 (2d Cir. 1975), *cert. denied* 423 U.S. 826, 96 S.Ct. 41 (1976).

The Fifth Circuit view denies a defendant due process of law, *Brooks v. United States,* 253 F.2d 362 (5th Cir. 1958), because a finding of materiality as to all issues, central and peripheral, but without proof of materiality, reads that requirement out of 18 U.S.C.A. §1623. Moreover, this view restricts the feasibility of cooperative witnesses before the Grand Jury, as witnesses will be stigmatized by the spectre of a perjury

charge for nearly any false, or even literally true, but misleading, statement, whether central or peripheral to the investigation under the Fifth Circuit's interpretation.

Impairment of the Grand Jury proceedings as a whole will result from a lack of cooperative and forthright witnesses. While the sanction against perjury seeks to prevent this type of interference, an interpretation as broad and encompassing as the Fifth Circuit's view does more to encourage resistance than prevent it. The question of materiality and proof of same must be resolved and the conflicts within the Circuits settled to protect the integrity and credibility of Grand Jury investigations.

CONCLUSION

The Petitioner herein was denied basic fundamental rights guaranteed to her by the United States Constitution. Based on the arguments and authorities cited herein, Petitioner, ANITA ABRAMS, urges this Honorable Court to grant this Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and reverse her conviction and sentence herein.

Respectfully submitted,
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JOEL HIRSCHHORN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed to MARSHA LYONS, Assistant United States Attorney, 300 Ainsley Building, 14 N.E. First Avenue, Miami, Florida 33132 this 23 day of March, 1978.

JOEL HIRSCHHORN

Appendix

Appendix A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Anita ABRAMS,
Defendant-Appellant.

No. 77-5107.

United States Court of Appeals.
Fifth Circuit.

Feb. 24, 1978.

Defendant was convicted before the United States District Court for the Southern District of Florida, at Miami, Gus J. Solomon, J., by designation, on two counts of making false material statements before a federal grand jury, and she appealed. The Court of Appeals, Brown, Chief Judge, held that: (1) evidence on one count overwhelmingly supported jury conclusion that defendant gave false testimony; (2) because questioner failed, for whatever reason, to pin defendant down on other charges and asked instead general hypothetical questions, her conviction on another count had to be reversed; (3) trial judge did not abuse his discretion in denying motion for mistrial and (4) record, taken as a whole, failed to demonstrate that defendant was denied a fair and impartial trial.

Affirmed in part and reversed in part.

1. Perjury — 33(8)

Evidence on one count overwhelmingly supported jury conclusion that defendant, who worked as a secretary and bookkeeper in law office, gave false testimony before grand jury in connection with a cost breakdown prepared for a client following client's complaint to the Florida bar. 18 U.S.C.A. §1623.

2. Criminal Law — 1159.2(10)

Applicable standard of review in determining sufficiency of evidence to support defendant's conviction of making false material statements before a federal grand jury was not whether the Court of Appeals thought the evidence sufficient but whether a reasonable jury would so conclude beyond a reasonable doubt. 18 U.S.C.A. §1623.

3. Criminal Law — 144.13(3)

Evidence in criminal case must be viewed in light most favorable to the government.

4. Perjury — 33(8)

Every answer set forth in a single count does not have to be false to sustain conviction of making false material statements before a grand jury. 18 U.S.C.A. §1623.

5. Perjury — 33(2)

In light of overwhelming evidence that defendant, who worked as secretary and bookkeeper in law office,

must have known or recalled in connection with grand jury questions concerning cost breakdown prepared for a client following complaint to the Florida bar that certain investigation and photography costs were never incurred and that $75 for conferences and $35 for photographs were somehow fabricated in response to bar inquiry, jury could have reasonably concluded that defendant knew full well that certain of her grand jury answers were false. 18 U.S.C.A. §1623.

6. Perjury — 11(2)

Test for materiality is whether false testimony was capable of influencing tribunal on issue before it; however, statements need not be material to any particular issue but may be material to any proper matter of inquiry. 18 U.S.C.A. §1623.

7. Perjury — 9

Questions which sought to determine whether costs deducted from attorney's clients' payments were actually incurred and which formed basis for defendant's conviction of making false answers before a grand jury constituted proper subject of grand jury inquiry into various allegations stemming from insurance claims, which investigation resulted in indictment of attorney and another for use of the mails to execute a fraudulent scheme. 18 U.S.C.A. §1623.

8. Perjury — 11(7)

Government need not show that because of perjured testimony, grand jury threw in towel or that investigation was actually impeded; all the law requires is that

the witness' false answers were capable of influencing tribunal on issue before it, including any matters collateral thereto. 18 U.S.C.A. §1623.

9. Perjury — 33(6)

Evidence in prosecution for making false statements, from which jury could conclude beyond reasonable doubt that certain of defendant's statements before federal grand jury were false, was sufficient to show that answers of defendant, who worked as secretary and bookkeeper in law office and testified before grand jury in regard to cost breakdown prepared for client following complaint to Florida bar, were capable of influencing tribunal on issue before it, an investigation of use of mails to execute fraudulent scheme involving insurance claims, and were therefore material. 18 U.S.C.A. §1623.

10. Perjury — 33(6)

One way in which government can meet its burden of showing materiality in prosecution for making false statements is by introducing transcript of prior proceeding at which statements were made, and thus Government, which not only introduced entire transcripts of all three of defendant's grand jury appearances but also introduced indictment setting forth factual basis for trial judge's finding and instruction on materiality, sufficiently placed evidence of materiality before the jury. 18 U.S.C.A. §1623.

11. Perjury — 12

Federal perjury statute is not violated when witness gives an evasive, nonresponsive but literally true answer, even if answer is intentionally misleading and arguably false by negative implication. 18 U.S.C.A. §1621.

12. Perjury — 12

Making false material declarations before a grand jury is a species of perjury and thus perjury requirement of literal falsity is applicable to offenses charging false material declarations before a grand jury. 18 U.S.C.A. §§1621, 1623.

13. Perjury — 12

Where defendant, who worked as a secretary and bookkeeper in law office, who testified before grand jury in connection with cost breakdown prepared for client, and who was never asked whether and never stated that charge sheet accurately reflected costs, was not pinned down on charges but instead questioner asked general hypothetical questions, her conviction on one count charging her with making false material statements before federal grand jury had to be reversed and, since the Government could not now cure questions' defects, a judgment of acquittal entered. 18 U.S.C.A. §1623.

14. Constitutional Law — 268(8)
Criminal Law — 641.13(2)

Where most questionable instances occurred out of presence of jury and challenged actions before jury,

viewed as a whole, did not amount to intervention which could have led jury to predisposition of guilt by improperly confusing functions of judge and prosecutor, judge's behavior did not prevent defense counsel from conducting defense as he ordinarily would have, defense was not sole target of judge's dissatisfaction, and, significantly, defendant was acquitted on one count, defendant's Fifth Amendment due process right to fair and impartial trial and her Sixth Amendment right to effective assistance of counsel were not violated by trial judge's conduct. U.S.C.A.Const. Amends. 5, 6.

15. Criminal Law — 655(5)

While a trial judge's disparagement of advocates appearing before him is not to be condoned, in the final analysis question whether prejudicial trial court conduct reaches constitutional magnitude is a matter of degree.

16. Criminal Law — 867

Where witness' answer that he worked for county-organized crime bureau was truthful, it was customary to have witnesses state where they were employed, jury acquitted defendant on one count, and was instructed more than once that sole issue before it was whether defendant deliberately lied to grand jury, denial of motion for mistrial on ground that witness' answer improperly permitted jury to infer that defendant, who worked as attorney and bookkeeper in law office, was in some way linked to organized crime was not an abuse of discretion. 18 U.S.C.A. §1623.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, RONEY and FAY, Circuit Judges.

BROWN, Chief Judge:

A jury returned a verdict of guilty against Anita Abrams on two out of three counts of making false material statements before a federal grand jury in violation of 18 U.S.C.A. §1623.[1] She claims on this appeal that she was denied a fair trial, first, because of the prejudicial misconduct of the Trial Judge, and second, because of his failure to grant a mistrial following an allegedly prejudicial answer by one witness. She also challenges the sufficiency of the evidence as to both counts.[2] We agree only that there is insufficient evidence to support the verdict on Count III and reverse as to that count. Her conviction on Count II is affirmed.[3]

Because of the extremely complicated nature of this case, we will set forth the facts as they relate to each issue raised by appellant and address the sufficiency attack first.

---

[1]Abrams was acquitted on Count I.

[2]Defense motions for judgment of acquittal and a new trial were denied.

[3]Abrams received an 18-month sentence and a $1,000 fine on Count II. The sentence on Count III was suspended and she was placed on probation for three years to run consecutively with the Count II sentence.

I. Sufficiency Of The Evidence

The United States Attorney for the Southern District of Florida had been conducting an investigation into various allegations stemming from insurance claims filed by the law offices of James A. Davis for numerous clients who had received medical treatment from Dr. M. S. Fox[4] or Westchester Hospital or both. Settlement of accident cases following negotiations with insurance companies or trial would be made by Davis' office. The insurance company would pay claims to Davis who, in turn, would disburse the proceeds to his clients, the accident victims, after deducting attorneys' fees, medical expenses, court costs, investigative fees, and other related costs.

Abrams, who worked as a secretary and bookkeeper in Davis' office, was subpoenaed by the grand jury in 1976 and was ultimately granted use immunity. She made three appearances before the grand jury; Counts II and III arose out of her July 26, 1976 appearance.[5]

A. Count II: The Yva Henry Case

1. Documentary Evidence

The false statements which formed the basis of this count involved a cost breakdown which had been prepared for Yva Henry, a client of Davis. Henry had written a letter dated March 12, 1974 to Paul Gross of

[4]Defense counsel informed the Court at oral argument that Davis and Fox were convicted on 104 counts of mail fraud.

[5]The transcripts of all three appearances were admitted into evidence.

the Florida Bar complaining about the amount she was to receive in settlement of her claim for an accident which had occurred in April 1973.[6] Gross forwarded this complaint to Davis on March 15, 1974 and requested a written response.[7] By letter dated April 1, 1974, signed for Davis by Abrams, the latter forwarded to the Florida Bar a "closing statement" on the Henry Case,[8] containing a $231.50 charge for "Costs."

On April 2, 1974, Gross called Davis' office to request a breakdown of the $231.50 in costs as shown by the following telephone message directed to "Anita:"

[6]Gov't Ex. 3A. The Yva Henry file was seized pursuant to a search warrant.

[7]Gov't Ex. 3B.

[8]This closing statement (the second page of Gov't Ex. 3C) contained the following breakdown:

CASE NO. 5564

CLOSING STATEMENT
FOR
HENRY - YVA

SETTLEMENT		$6,500.00
ATTORNEY'S FEES	$2,600.00	
COSTS	231.50	
DR. M. S. FOX	475.00	
DR. P. LIPPMAN	40.00	
JACKSON MEMORIAL HOSPITAL	49.00	
WESTCHESTER GENERAL HOSP.	804.50	
	$4,200.00	$4,200.00
PROCEEDS TO CLIENT		$2,300.00

Yva Henry —
(cost 231.50 wants
breakdown?) [9]
5564 Case No.

That same day, Abrams signed a letter to the Florida Bar on behalf of Davis, enclosing a breakdown she prepared which listed these items:[10]

	CHARGE SHEET ON YVA HENRY	CASE NO. 5564
[1]	Conference with Dr. M.S. Fox (4/25/73)	$50.00
[2]	Conference with Dr. M.S. Fox (6/1/73)	25.00
[3]	Investigation and Photography	107.50
[4]	Photographs	35.00
[5]	Accident Report	3.00
[6]	Westchester General Hosp.— Medical Records	6.00
[7]	Jackson Memorial Hospital— Medical Records	5.00
	Total	$231.50

Items [1]-[4] of this breakdown are the source of Abrams' present problems.

[9]This telephone slip forms part of Gov't Ex. 7.

[10]The letter and enclosed breakdown comprise Gov't Ex. 3D. The items are numbered with brackets for easy reference. According to Davis, he worked up the breakdown and instructed Abrams on what was to be done. Abrams told the grand jury that she prepared the breakdown. See appendix, answer 47.

As to items [1] and [2] (the two conferences with Dr. Fox on 4/25/73 and 6/1/73), Gov't Ex. 14, which was taken from the Yva Henry file in Dr. Fox's office, is critical. That exhibit comprises undated slips of paper, one of which is a telephone call memo reading in part:

$75	JAD[11]
Bill Conference	(2)
Iva Henry	50
	25

The other critical slip of paper from Fox's Henry file forming the second part of Ex. 14 reads:

Fla Bar
Assn.

Mr. Gross

Eva Henry

Re:

JAD

4/22/74

to verify
total bill
$400 — or $475

The bottom half of this note, beginning with "4/22/74" appears to be in a different handwriting from the top half. The third portion of Gov't Ex. 14 comprises an exact duplicate of an undated typed bill to Davis for the

[11]The obvious reference here is to James A. Davis.

two office conferences in April and June 1973 which appears in the Henry file in Davis' office.[12]

Item [3] on the breakdown, relating to $107.50 for investigation and photography, was ostensibly covered by a May 17, 1973 typed invoice in duplicate on the billhead of Worldwide Detective Agency.[13] This bill charged $100 for investigative services and $7.50 for "auto."

With regard to item [4] covering $35 for photographs, the Henry file contained two critical documents: a photography shop invoice for film and a film developing envelope, both dated April 2, 1974, the same day on which the Florida Bar telephone inquiry and the Abrams breakdown were made.[14] The photographs of the location of the Henry accident which were placed in

[12]Gov't Ex. 9. It is significant to note that these two conferences on April 25 and June 1, 1973 for $50 and $25, respectively, were not billed as the Henry case progressed as had Henry's other medical expenses. This fact is demonstrated by Gov't Ex. 4, which contains a July 27, 1973 bill from Dr. Fox for services rendered for Henry. A $200 item on that bill covers 20 office visits at $10 each. One $10 office visit was on April 25; another was on June 1. See also in this connection note 23, infra.

[13]Both the original and duplicate were found in Davis' files and they comprise Gov't Ex. 10.

[14]Gov't Ex. 11. It must be borne in mind that the Yva Henry case was closed by April 2 (she was complaining about the amount Davis was to receive from the total settlement). The point is, why was there any need for photographic work on April 2, 1974?

the Henry file could not have been taken any time before March 1974.[15]

The most significant document in Davis' Henry file is a slip of paper comprising part of Gov't Ex. 7.[16] The first four lines of this slip, listing the four items, are in Davis' handwriting. The addition and subtraction are in Abrams' handwriting.

[15]Gov't Ex. 12. At least one of the photos showed a construction site. It was stipulated at trial that a witness would testify that he did not begin construction at this site until March 1974.

[16]The other part of Ex. 7 was the telephone message to "Anita." See text at note 9, supra.

Photos 10 a 3.50		35.00[17]
A.R.[18]		3
W.R.[19]		6
J.M.H.[20]		5
		49.0
		75
		124
		231.50
		124.00
		107.50

Another slip of paper, totally in Davis' handwriting (Gov't Ex. 8), reads:

231.50

Invest.	150	24.90
Conf. Dr.	100	1.50
Acc. Report	23	26.40
West.	6	1.50
J.M.H.	5	27.90

[17]It is interesting to note that Gov't Ex. 11, see note 14, supra and accompanying text, contains 11 photos, not 10. The photo envelope, Ex. 11, dated April 2, 1974, shows that 11 prints were made. Furthermore, no matter which figures on the film envelope are used — the regular price for development ($36.85) or the discount price ($28.49) — to add to the photography shop invoice for film ($1.46), the total is not $35.00.

[18]"A.R." apparently means accident report.

[19]Westchester report.

[20]Jackson Memorial Hospital.

A comparison of these figures and those of Ex. 7 with the figures on the breakdown (see text following note 10, supra) reveals that the breakdown sent to the Florida Bar matched the figures of Ex. 7 containing Abrams' mathematical calculation.[21]

2. The Grand Jury Testimony

The testimony which formed Count II of the indictment fills nine legal-size pages. So that we do not further lengthen this opinion, that testimony is attached as an appendix. The questions and answers are numbered for easy reference and the statements which we believe the jury could reasonably have concluded were false are italicized.

[1-3] Abrams maintained throughout her grand jury testimony[22] that the $231.50 figure was based on bills actually in the file prior to the settlement of the Henry case, on the cost sheet she prepared as the Henry case progressed, or on cost cards which the accountant had.[23] Indeed, she effectively, denied fabricating the

[21]The calculation is in text following note 20. See also note 10, supra.

[22]Abrams did not testify at the trial.

[23]See appendix, answers 2, 18, 20, 36, 48, 50, 51.

Abrams' grand jury testimony and Davis' trial testimony on accounting procedures was far from clear; indeed, it can only be described as totally evasive. We have, however, gleaned from the record that at the time when Abrams took over as Davis' bookkeeper, Davis' accountant was keeping tabs on costs disbursed in behalf of clients through the use of cost cards which he personally maintained. From these cost cards, Abrams would prepare clos-

(Footnote 23 continued on next page)

(Footnote 23 continued)

ing statements, pay bills, etc. She ultimately instituted a system of "charge" or "cost" sheets on which she (as opposed to the accountant) would enter various costs for each client as they were incurred. According to Davis, charge sheets were kept separate from the file. The cost sheet for the Henry case was missing during the grand jury hearing and at trial and nothing in the record explains its unavailability.

The grand jury testimony given to the jury additionally disclosed one other method of keeping track of costs chargeable to clients. The accountant maintained a journal on which Davis checks made out by Abrams in payment of each client's bills for costs were entered by the accountant. The journal sheet for Yva Henry, not made an exhibit at the Abrams trial, showed $150, not $231.50, in costs. This $150 amount did not include checks issued to Dr. Fox for the two conferences as the following grand jury testimony demonstrates:

Q. When such conferences are billed to a client, would Dr. Fox be paid for such a conference?

A. Yes, he would.

Q. How would he be paid?

A. By check.

Q. And where would this cost be listed?

A. On the charge sheet.

Q. So if there was a conference, such as this, there should be a check to Dr. Fox; is that right?

A. There should be, yes.

Q. That's also not listed in this ledger sheet concerning Yva Henry that you looked at before, is it?

(Footnote 23 continued on next page)

costs.[24] We believe that the evidence overwhelmingly supported a jury conclusion beyond a reasonable doubt that she gave false testimony.[25] Our view is that the jury could have reasonably concluded that actual events proceeded along the following lines and that Abrams must have known about and remembered those events when she testified before the grand jury: When the Florida Bar request for the $231.50 cost breakdown was made, Abrams — or someone in Davis' office with Abrams' knowledge — arranged to have the photographs taken (item [4], $35), Davis listed minor amounts to be charged for perfunctory reports made in almost every accident case (items [5]-[7], $14), and Abrams — or someone in Davis' office with Abrams' knowledge — arranged with someone in Dr. Fox's office to bill Davis for $75 of those costs (items [1] and [2]). And when Abrams totaled those costs and arrived at only $124, she subtracted the subtotal from $231.50, got $107.50, and she — or someone in Davis' office with her knowledge — fabricated an invoice on Worldwide Detective Agency billhead (item [3]) to justify the $107.50 difference. This view is based on the following.

(Footnote 23 continued)

A. No.

Grand Jury Tr. at 84 (Gov't Ex. 2A).

[24]See appendix answers 15, 33. See also answer 39.

[25]The applicable standard of review is not whether we think the evidence sufficient but whether a reasonable jury could so conclude beyond a reasonable doubt. E.g., United States v. Parr, 5 Cir., 1975, 516 F.2d 458, 464. Additionally, evidence in a criminal case must be viewed in the light most favorable to the government. E.g., United States v. Duhon, 5 cir., 1978, 565 F.2d 345 (1978).

First, it is clear from the documentary evidence that the Fox conferences were not billed in the ordinary course (see notes 12 and 23, supra). Second, the Fox bill is not dated as is the other Fox invoice for $475 (see notes 8 and 12, supra). Third, it is also clear that the Davis office requested that these conferences be billed in response to the Florida Bar inquiry. Thus, as to the Fox conferences, there was sufficient evidence for the jury to conclude beyond a reasonable doubt that Abrams violated §1623 when she denied knowing the circumstances under which the undated Fox bill was prepared.[26]

There was also sufficient evidence to support a conclusion beyond a reasonable doubt that Abrams gave perjured testimony concerning item [3], the $107.50 invoice from Worldwide Detective Agency for investigation and photography. Weigel, owner of Worldwide, stated that a search of his records disclosed no investigation having been conducted on the Yva Henry case. Moreover, when Weigel billed clients, he never submitted the original and the copy as ostensibly was done in the Henry case.[27] Hallen, a Worldwide employee who did investigative work for Davis on Weigel's license, also found no record of investigative or photographic work done in behalf of Henry. Hallen would bill Davis by submitting to Abrams handwritten slips containing case numbers and the plaintiff's name; he never typed invoices. Abrams paid Hallen directly by check. Hallen unequivocally denied submitting the typed $107.50 invoice of Gov't Ex. 10.[28] Furthermore, sometime in 1973, Hallen, with Weigel's permission, had given blank Worldwide billheads to Joe Moore, Davis' office manager.[29]

Based on this uncontradicted testimony, the jury was justified in finding that Abrams made false statements when she named Hallen as the source of the $107.50 figure[30] and when she said that the bill was prepared by the investigator,[31] and submitted.[32] In addition, Abrams' asserted failure to remember and denial of knowledge as to what she was doing when she performed the mathematical calculation of Gov't Ex. 7[33] could reasonably have been considered perjured.[34]

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[26]See appendix, answer 54.

[27]See note 13, supra and accompanying text.

[28]Hallen was the only investigator to whom these invoiced services could have been attributed. Weigel did not personally do any work for Davis. Hallen worked for Davis on a case-by-case basis. The other investigator used by Davis was on the attorney's regular payroll.

[29]Moore had previously worked for Worldwide. In fact, Hallen replaced Moore when Moore left the agency.

[30]See appendix, answers 25 and 30. If the jury believed Hallen and Weigel, as undoubtedly was the case, the conclusion is inescapable that these answers were false because Hallen was the only investigator in a position to perform and bill these services. See note 28, supra.

[31]See appendix, answer 55.

[32]See appendix, answers 58 and 60. See also answer 30.

[33]See text following note 20, supra.

[34]See appendix, answer 27.

Similarly, there was abundant evidence to support a beyond-a-reasonable-doubt conclusion that Abrams' testimony concerning the $35.00 for photographs was false. The invoice for film and the film envelope were both dated April 2, 1974, the same day on which the Florida Bar telephone inquiry was made when the Henry case was, for all intents and purposes, closed.[35] Hallen never performed any photographic work on the Henry case and did not submit the invoice for photography services. And at least one of the photographs in the Henry file establish that the pictures were not taken until at least eleven months after Mrs. Henry's April 1973 mishap.[36] No sensible explanation was forthcoming as to why photography costs need have been incurred in connection with a closed case, and the grand jury gave Abrams every opportunity to offer one.[37]

Thus, we think a jury could justifiably find that Abrams committed perjury when she (i) told the grand jury that the bills were Dave Hallen's,[38] (ii) denied knowing the circumstances under which the photographic bills were obtained,[39] and (iii) denied that

[35]See note 14, supra.

[36]See note 15, supra and accompanying text. See also note 17, supra.

[37]Abrams' tortured attempts to explain the presence of these bills in the Henry file can be found in the appendix, questions and answers 37-53.

[38]See appendix, answer 39.

[39]See appendix, answers 52, 53. For examples of extremely evasive, if not literally false, answers regarding the photography bills, see appendix, answers 8-14.

the bills were obtained the day after receiving the Florida Bar letter to justify the costs.[40]

Lastly, based on all the evidences relating to the four items on the breakdown, we believe that a jury could conclude beyond a reasonable doubt that Abrams' statements that the $231.50 in costs came from cost sheets and cost cards,[41] and her denial of attempts to justify the costs[42] were false.

[4] Appellant's sufficiency challenge is multi-pronged. Abrams argues first that she responded to questions by describing the office routine she normally "would" use, instead of stating what she actually "did" with respect to a particular item. We agree with this argument as to certain answers,[43] but believe it conveniently overlooks many others.[44]

This argument also ignores the settled principle that every answer set forth in a single count does not have to

[40]See appendix, answer 15.

[41]See appendix, answers 2, 18, 36, 48, 50.

[42]See appendix, answer 33.

[43]See, for example, answers 8, 9, 13, 20, 40. Likewise, some questions were framed in terms of what would occur, as opposed to what did occur. See, for example, questions and answers 14, 59. Under the standards announced in Bronston v. United States, 1973, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 and United States v. Brumley, 5 Cir., 1977, 560 F.2d 1268, discussed infra in connection with Count III, answers to such questions cannot form the basis of a perjury conviction.

[44]See, for example, answers 2, 18, 33, 39, 48, 50, 60.

be false to sustain a conviction. United States v. Bonacorsa, 2 Cir., 1976, 528 F.2d 1218, 1221-22; Stassi v. United States, 5 Cir., 1963, 401 F.2d 259,262, vacated on other grounds sub nom. Giordano v. United States, 1968, 394 U.S. 310, 89 S.Ct. 1163, 22 L.Ed.2d 297.

Second, appellant contends that there was no evidence introduced to show that she willfully and knowingly lied to the grand jury, that is, that she knew the charges were not incurred and remembered that fact. In this connection we are asked to ponder the thousands of cases which passed through, and the thousands of transactions taking place in, this busy, disorganized law office, all of which made it unreasonable for Abrams to remember the details of the Henry cost breakdown. There are several answers to this contention.

Abrams typed and signed on Davis' behalf the letters to the Florida Bar, and she — according to her grand jury testimony — prepared the cost breakdown. This office work was necessary only because a very serious complaint about Davis had been lodged with the Bar. Abrams was an employee in a law office where such complaints should not have been an everyday occurrence and should not have been treated routinely or cavalierly. All the more so because Abrams was well aware in April 1974 that Davis had been the target of a recent investigation. Indeed, that investigation prompted a meeting of Davis' staff which Abrams attended and during which Davis instructed the staff to take certain actions.[45]

[45]This investigation, which took place in September 1973, was apparently conducted by a local television station. Abrams' grand jury testimony concerning this staff meeting formed the basis of Count I as to which extensive testimony was given at trial, including what prompted the meeting.

[5] In light of this background, the jury could have reasonably concluded that the Henry cost breakdown was not as forgettable as appellant contends and that Abrams knew full well that certain of her answers were false. This is especially so in light of the overwhelming evidence which could lead a jury to conclude that Abrams must have known or recalled that the $107.50 cost for investigation and photography was never incurred and that the $75 for conferences with Dr. Fox and the $35 for photographs were somehow fabricated in response to the Florida Bar inquiry.[46]

A Similar argument was raised in United States v. Chapin, 1975, 169 U.S. App.D.C. 303, 515 F.2d 1274, 1284. In rejecting the sufficiency attack, the Court stated:

> [I]n the absence of a statement by the defendant, the falsity of an "I don't recall" answer must be proven by circumstantial evidence. This does not mean that proof is impossible. As another court has stated, "The jury must infer the state of a man's mind from the things he says and does. Such an inference may come from proof of the objective falsity itself, from proof of a motive to lie, and from other facts tending to show that the defendant really knew the things he claimed not to know" or recall. [Citations omitted.]

[46]It should be emphasized that several perjured answers did not involve "I don't know" or "I don't remember" responses. For example, Abrams stated unequivocally that the investigator prepared the Worldwide invoice for $107.50. the jury obviously believed Hallen's testimony to the contrary.

Id., 169 U.S.App.D.C. at 313, at 515 F.2d 1284. In applying these principles, there was abundant proof — already detailed at length — of objective falsity and other facts tending to show that Abrams really knew or recalled that which she denied knowing or recalling. As to motive, the jury knew that Abrams was employed by Davis when she appeared before the grand jury and it was at liberty to draw reasonable inferences concerning motive from the employer-employee relationship, as well as from the grant of use immunity.[47] The jury, properly instructed, resolved this issue against Abrams and we see no reason to disturb its verdict here.

The third prong of Abrams' sufficiency attack relates to materiality. She urges that even if we hold her answers to be perjurious, they were not "capable of influencing the grand jury on the issue it was investigating; namely whether Attorney James Davis was using the United States Mails to defraud insurance companies by 'ambulance chasing,' cooperating with doctors to increase medical bills to 'get over' Florida's Uninsured Motorist Statute threshold amounts and similar conduct." Appellant's brief at 50.

[6] The test for materiality, as Abrams correctly concedes, is whether the false testimony was capable of influencing the tribunal on the issue before it. E.g., United States v. Brumley, 5 Cir., 1977, 560 F.2d 1268; United States v. Damato, 5 Cir., 1977, 554 F.2d 1371; United States v. Parr, 5 Cir., 1975, 516 F.2d 458. However, the statements need not be material to any

[47]The jury was instructed that it should carefully scrutinize the circumstances under which each witness testified and that it could consider each witness' intelligence, motive, and state of mind.

particular issue but may be material to any proper matter of inquiry. Damato, supra; United States v. Makris, 5 Cir., 1973, 483 F.2d 1082; United States v. Gremillion, 5 Cir., 1972, 464 F.2d 901; Barnes v. United States, 5 Cir., 1967, 378 F.2d 646.

The grand jury was investigating various allegations stemming from insurance claims. That body has substantial leeway in conducting its investigation. This Court has approved the following language from United States v.Stone, 2 Cir., 1970, 429 F.2d 138, 140:[48]

> A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.

[7] The questions seeking to determine whether costs deducted from Davis' clients' payments were actually incurred was a proper subject of grand jury inquiry which resulted in the indictment of Davis and Fox for use of the mails to execute a fraudulent scheme. Abrams argues that Davis' clients were not the victims or complainants, that the insurance companies were, ergo, no materiality. Appellant's brief at 51. We are totally at a loss to understand this argument. Not only were the insurance companies victimized, but so were

[48]Quoted with approval in United States v. Parr, supra, 516 F.2d at 469.

Davis' clients and the Florida Bar as well.[49] If the fabrication and inflation of medical and other costs were part and parcel of an illegal scheme to obtain money and property by false representations, the grand jury was authorized to explore every aspect of that scheme in an effort to determine whether a federal crime had been committed.

[49]Because this contention was made in the briefs and pressed so earnestly at oral argument, we checked the trial record in the Davis-Fox case, now on appeal in this Circuit. The indictment alleges a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, from various insurance carriers, accident victims, and the Florida Bar. The alleged objects of the scheme were to (a) induce accident victims to institute claims against insurance carriers and to induce the carriers to pay claims to the defendants and their clients by submitting false and inflated medical bills; (b) reduce payments to accident victims by deducting false and inflated medical bills and costs from the total amount of their settlements; and (c) defraud the Florida Bar from conducting legitimate inquiries into matters raised by clients of Davis by preparing and submitting to the Florida Bar false and inflated justifications for cost. Two of the false and fraudulent statements and representations cited in Count I of the Davis-Fox indictment were the breakdown submitted to the Florida Bar (Count III of the Abrams indictment) and the court reporter charges listed in the Eduardo Valdez case (Count II of the Abrams indictment, Section I-B infra). Counsel for Abrams stated, inter alia, at oral argument, "In fact, Counts II and III which we're here on really didn't deal with the same issues that the grand jury was investigating . . . The statements and the questions and the answers which the government has alleged to be perjurious are not material, were not material to the grand jury's investigation because they really didn't deal with the issue of insurance fraud per se but rather it was a separate matter involving the client and the attorney." Any doubts as to materiality that we may have entertained because of these arguments and our ignorance of the true facts have been completely dispelled by our study of the Davis-Fox indictment.

[8,9] A subpart of the materiality argument is that Abrams' answers in no way "deterred, misled or otherwise influenced the grand jury from conducting and completing its investigation." Appellant's brief at 50. This contention misperceives the legal requirements regarding materiality. The government need not show that because of the perjured testimony, the grand jury threw in the towel. Actual impediment of the investigation is not required. E.g., United States v. Makris, supra; United States v. Gremillion, supra. Such a ridiculous rule would mean that the grand jury believed the witness and placed so much importance on his testimony that further inquiry was useless. Grand jurors are capable of judging credibility and they are free to disbelieve a witness and persevere in an investigation without immunizing a perjurer. All the law requires is that the witness' answers were capable of influencing the tribunal on the issue before it, including any matters collateral thereto. The answers analyzed above easily passed that test and the Trial Court's finding and instruction on materiality were proper.

[10] Finally, Abrams complains that the government failed to place before the jury evidence of materiality. This complaint is frivolous. One way in which the government can meet its burden on this score is by introducing the transcript of the prior proceeding. See Damato, supra, 554 F.2d at 1373 and cases cited in note 3. To paraphrase what one Court stated, the best way to know what the grand jury deems material is by reading what it asked about. United States v. Sweig, S.D.N.Y., 1970, 316 F.Supp. 1148, 1164. Not only was the entire transcript of all three Abrams' grand jury appearances introduced at trial, but the jury additionally had before it the Abrams indictment which set forth the

factual basis[50] for the Trial Judge's finding and instruction on materiality as required in this Circuit. See Brumley and Damato, supra.

B. Count III: The Eduardo Valdez Case

Eduardo Valdez, like Yva Henry, was a client of Davis. The Valdez "charge sheet,"[51] Gov't Ex. 15, shows the costs incurred in his behalf. Under the heading "COURT REPORTERS," the following handwritten entries appear:

[50]Count II read in part as follows:

2. At the time and place aforesaid the Federal Grand Jury was conducting an investigation into various allegations stemming from insurance claims filed by the law offices of James A. Davis, II. These claims for damages were made on behalf of people involved in vehicular accidents who were represented by the Davis law firm. Settlements of accident claims would be negotiated by personnel at Davis' office and insurance drafts would be issued jointly to the client and James A. Davis, II. Payment would be made by Davis' office to the accident victim based on the amount of settlement after deducting attorney's fees, medical expenses and miscellaneous costs.

3. It was a matter material to said investigation to determine whether the expenses and costs deducted were actually incurred.

[51]For an explanation of this term, see note 23, supra.

		Date	Check No.	Amount
[1]	Castillo & Castillo	4/10/75	1831[52]	87.40
[2]	Jack Besoner & Associates	5/19/75	1897[53]	80.00

As to item [1], check No. 1831 was actually drawn for $75.70, not for $87.40. Richard Castillo testified that the check was received in payment of an invoice (Gov't Ex. 17) for court reporting services in connection with the case of Slater v. Faucett. In regard to item [2], check No. 1897 was actually drawn for $11.25, not for $80.00. Moreover, Besoner's ledger sheet, Gov't Ex. 18, shows that this check covered court reporting services in connection with the deposition of Jones in the case of Clark v. Jones. Apparently neither of these two depositions had anything to do with the Valdez case.

The following Abrams testimony is the subject of count III:

Q.1 Now, looking at Grand Jury Exhibit No. 2, do you recognize the handwriting?

A.1 Yes.

Q.2 Whose handwriting is that?

A.2 Mine.

Q.3 All that handwriting?

[52]The check and the check stub were received in evidence at Gov't Ex. 16A.

[53]The check and the check stub were received in evidence as Gov't Ex. 16B.

A.3 Yes.

Q.4 You have depositions listed there.

A.4 Yes.

Q.5 That's your handwriting, also?

A.5 Yes.

Q.6 In cases when you charge for a deposition like that did the particular client have a deposition taken?

A.6 Yes.

Q.7 And they would be — would you have somebody, a court reporter there to take down what they said?

A.7 I wouldn't be aware — I wouldn't be there when the court reporter was there.

Q.8 But there would be a cost?

A.8 Yes.

Q.9 Who would give you that cost?

How would you know what to charge for a particular item like that?

A.9 I would get a bill.

Q.10 From whom?

A.10 From the court reporter.

Q.11 Then you'd take that bill.

On the bill would it say the deposition or the particular work that was done on that?

A.11 Yes.

Count III alleges the following violation:

> The aforesaid testimony of Anita Abrams as she then and there well knew and believed, was false in that she had prepared the charge sheet in case number 5469 on Eduardo Valdez which reflects that check number 1897 dated May 19, 1975 in the amount of $80.00 was paid to Jack Besoner and Associates for court reporter costs which she knew did not accurately reflect the costs; all in violation of Title 18, United States Code, Section 1623.

[11, 12] While it is undoubtedly true that the Valdez charge sheet did not accurately reflect the costs, it is clear that Abrams was never asked whether and never stated that the charge sheet did accurately reflect the costs. Indeed, careful scrutiny of these answers in light of Bronston v. United States, 1973, 409 U.S. 352, 93 S.Ct. 595, 34 L.Ed.2d 568 reveals that none of these answers is literally false. Bronston stands for the proposition that the federal perjury statute, 18 U.S.C.A. §1621, is not violated when a witness gives an evasive, nonresponsive but literally true answer, even if the answer is intentionally misleading and arguably false by

negative implication.[54] Moreover, Bronston expressly places on the questioner the burden of pinning the witness down to the specific object of the inquiry. Chief Justice Burger wrote, "Precise questioning is imperative as a predicate for the offense of perjury." 409 U.S. at 362, 93 S.Ct. at 602, 34 L.Ed.2d at 576.

[13] As to the specific answers contained in Count III, there is no indication in the record that answers 1-5 are false. Questions and answers 7-11 are framed in terms of what Abrams "would do" as a matter of normal office routine and there is insufficient evidence in the record to support a conclusion beyond a reasonable doubt that these answers are false. None of questions 7-11 asks specifically what Abrams actually did with respect to the Valdez case. The only question which comes even close to asking directly about Valdez, by use of the verb "did" instead of "would," is No. 6: "In cases when you charge for a deposition like that did the particular client have a deposition taken?" (Emphasis added.) This question suffers an infirmity similar to those in questions 7-11, namely, it inquires about cases (plural) "like that", not about the Valdez case in particular.[55] There is insufficient evidence in the record to support a conclusion beyond a reasonable doubt that

[54]Making false material declarations before a grand jury is a species of perjury. United States v. Gross, 3 Cir., 1975, 511 F.2d 910, 915. Bronston's requirements of literal falsity for §1621 convictions are applicable to §1623 offenses. See United States v. Slawik, 3 Cir., 1977, 548 F.2d 75, 83, cited with approval in United States v. Brumley, 5 Cir., 1977, 560 F.2d 1268, 1275.

[55]We should also point out that nowhere in questions 6-11 is Valdez's name mentioned and nowhere is the word "accurately" used.

Abrams' affirmative response to question No. 6, indicating that in cases like that a deposition was taken, is false. Because the questioner failed, for whatever reason, to pin Abrams down on these charges and asked instead general hypothetical questions,[56] Abrams' conviction on Count III must be reversed. Since there is no way at this point for the government to cure the questions' defects, a judgment of acquittal must be entered on Count III. Brumley, supra, 560 F.2d at 1277.

II. Fair Trial

[14] Abrams contends that her Fifth Amendment due process right to a fair and impartial trial and her Sixth Amendment right to effective assistance of counsel were violated by the Trial Judge's conduct which prejudiced the defense in the eyes of the jury. As examples of a biased attitude against the defense, appellant cites nine incidents in the presence of the jury and six in its absence. These incidents fall generally into four categories: (i) interjection into the examination of witnesses; (ii) unjustified criticisms and rebukes of defense counsel; (iii) challenging defense questions without the government interposing an objection; and (iv) generally hostile remarks to defense counsel.

Appellant relies primarily on this Court's decision in United States v. Candelaria-Gonzalez, 5 Cir., 1977,

[56]For an affirmative answer to question No. 6 to have been perjured, the interrogator would have had to frame the question precisely and directly, for example, by asking, "When you charged the Castillo and Besoner invoices to Valdez, had the depositions in fact been taken in connection with his case?" Or, "Does the Valdez charge sheet accurately reflect court reporter charges that were actually incurred in the Valdez case?"

547 F.2d 291, in which disparagement, correction, and interruption of defense counsel was one factor which led to reversal of the conviction.[57] The record does indicate that the trial court exhibited some irritation with defense counsel. But under the standards carefully laid down by Judge Simpson in Candelaria-Gonzalez,[58] we are convinced that conduct of the trial did not rise to the level of a constitutional violation of Abrams' rights.

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[57][W]e view as a serious impropriety the trial judge's failure to preserve an appearance of impartiality.

But we base our decision to reverse on the conduct of the trial as a whole. We do not find it necessary to decide whether the trial judge's behavior standing alone was sufficiently prejudicial to require reversal.

547 F.2d at 297-98.

[58]A trial judge must exhibit neutrality in his language and in the conduct of a trial before a jury. He should avoid any possibility of prejudicing the jury through his criticism of or hostility toward defense counsel . . . Of course a trial judge is not required to remain silent and passive throughout a jury trial. To the contrary, he has a duty "to participate directly in the trial, and to facilitate its orderly progress and clear the path of petty obstructions. It is his duty to shorten unimportant preliminaries, and to discourage dilatory tactics of counsel." . . . But in performing this duty he must make every effort to preserve the appearance of strict impartiality. "The opinion of the judge, on account of his position and the respect and confidence reposed in him and in his learning and assumed impartiality, is likely to have great weight with the jury, and such fact of necessity requires impartial conduct on his part . . . "[T]he judge is a figure of overpowering influence, whose every change in facial expression is noted, and whose every word is received attentively and acted upon with alacrity and without question." [Citations omitted.]

Id. at 297.

First, the most questionable instances occurred out of the presence of the jury,[59] and the challenged actions

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[59]It might have been more troublesome had the following exchanges occurred in front of the jury:

MR. HIRSCHHORN: I have another case that is a more recent case with respect to perjury. It is the Lasater case. It's an Eighth Circuit case which says the false declarations in question must tend to influence, mislead or hamper the Grand Jury investigation.

THE COURT: Mr. Hirschhorn, this is not the first hearing we have had. We have had three other hearings. I urged you all of the time to give me the cases upon which you rely so I can make an investigation. You spring a thing like this on me at the last moment. The motion is denied.

At two o'clock, start putting on your case.

MR. HIRSCHHORN: If I might, Judge, with all due respect—

THE COURT: With all due respect to this court, it seems to me that you ought to abide by the rulings of the court and when I asked you to give me your decisions and your authorities, you ought to do it. That would really give your client a break because then if you have a good point, I would have been able to check it.

MR. HIRSCHHORN: Judge, as a practical matter, with all due respect, there is a tactical decision I have made in this case on the point I was about to argue. I don't care to give the government the benefit of my theory of the defense. I don't think I'm required to under the Fifth Amendment. I don't think I'm required to—

THE COURT: The motion is denied, Mr. Hirschhorn. You will be here at two o'clock.

Who are you going to call as your witnesses?

MR. HIRSCHHORN: Your Honor may I just give the court one case to read?

(Footnote 59 continued on next page)

(Footnote 59 continued)

THE COURT: I'm not going to be able to read it now, Mr. Hirschhorn. I have to eat. I have to work on the case.

MR. HIRSCHHORN: I'm going to work on the case too. I'm not going to eat.

THE COURT: Tell me who your first witness is going to be?

MR. HIRSCHHORN: I'm not certain.

THE COURT: You are not going to call any witnesses are you?

MR. HIRSCHHORN: I'm not certain whether I will or not.

THE COURT: Two o'clock.

MR. HIRSCHHORN: If the court please, may I give the case to your clerk?

THE COURT: Yes. I don't like to be kidded, Mr. Hirschhorn. I didn't believe you were going to put on your witnesses in the first place. You put down Mr. Davis. You are not going to call him.

MR. HIRSCHHORN: He's been subpoenaed, Your Honor.

THE COURT: The court will be in recess until 2:00 p.m.

Tr. 123-25 (emphasis added). Davis, as noted earlier, did testify for the defense.

This colloquy took place after the jury retired:

MR. HIRSCHHORN: Your Honor, I have a couple of matters in anticipation of an adverse verdict. First, I respectfully request the maximum time allowable within which to file a motion for new trial and renew motions under 29(c).

THE COURT: She will be in jail anyway. It wouldn't make any difference. You can have as much time as you want.

(Footnote 59 continued on next page)

before the jury, viewed as a whole, simply do not amount to intervention which could have led the jury to a predisposition of guilt by improperly confusing the

(Footnote 59 continued)

MR. HIRSCHHORN: The second issue, Judge, in the event there is a guilty verdict, will the court remand her at that time?

THE COURT: I think so.

MR. HIRSCHHORN: Well, there is no risk of flight here.

THE COURT: I don't know whether there is or not. What does the government say? I think there is.

MR. HIRSCHHORN: I might say, Judge, it will be the second time in six years of my Federal criminal cases I have had a defendant remanded pending a presentence.

THE COURT: Mr. Hirschhorn, you're not running this court.

MR. HIRSCHHORN: I know.

THE COURT: I just want to let you know that.

MR. HIRSCHHORN: I'm well aware of that.

THE COURT: Apparently you have been trying to all of the time.

MR. HIRSCHHORN: Well, I am well aware of that. That's why I asked the government first. In fact, I told the government you would probably remand her. But I would like to have a hearing on the issue of whether remand is really necessary.

THE COURT: We will have it in the next few days. I will order the defendant taken into custody right now pending the return of the verdict. I don't want you to start trying to push me around. I don't like that, Mr. Hirschhorn.

Tr. 222-24 (emphasis added).

functions of judge and prosecutor. United States v. Gomez-Rojas, 5 Cir., 1975, 507 F.2d 1213, 1223-24.[60]

[60]The following are typical examples.

(1) When defense counsel asked for a short recess to discuss a stipulation (at that time the parties were awaiting the arrival of government witnesses), the Court stated:

> Remember I asked you to do that in advance of the trial. There are twelve people here waiting. We are going to take a recess. This is the last time we are going to do it.

Tr. 20.

(2) When defense counsel asked for Jencks material, the court stated, "You were supposed to be here at seven o'clock this morning and pick that up." Tr. 57. Apparently the Court was unaware that counsel had arranged to meet and exchange this material at a more ordinary hour the day before, at which time some documents had inadvertently been omitted.

(3) This exchange occurred during the examination of Mr. Gross of the Florida Bar:

Q You said it is not unusual to get hundreds of these complaints?

A I get hundreds of complaints.

Q From clients who think it is unfair that lawyers—

A That's right.

Q Who handle their cases on a contingency basis and wind up getting as much or more than they do?

A Well, I don't know.

THE COURT: How is that going to prove or disprove any issue in this case? What is the relevancy of that?

(Footnote 60 continued on next page)

Second, the Court instructed the jury that (i) it was not to assume from his questioning of a witness that he had any opinion on the matter to which the questions related; (ii) it was not to draw any inference against the side to whom an admonition may have been addressed; (iii) it should disregard any opinion of his as to the facts; and (iv) it was the sole judge of Davis' credibility despite the court's remarks aimed at putting a stop to repetitious testimony by Davis.[61] Third, defense counsel

(Footnote 60 continued)

MR. HIRSCHHORN: I didn't hear the government object.

THE COURT: That doesn't give you the privilege of asking irrelevant questions.

MR. HIRSCHHORN: I have a theory in the case. I believe it is relevant.

THE COURT: Tell me the theory of the case.

MR. HIRSCHHORN: Judge, I believe that the government — the jury is entitled to know, this is not an isolated incident involving one particular lawyer.

THE COURT: That doesn't make any difference. That has absolutely no relevancy on whether this woman committed perjury or not. This is what we are here to determine, whether she was asked certain questions and whether she wilfully told falsehoods. That is the issue in this case. It is not the question of whether the lawyers or doctors overcharged or whether they engaged in ambulance chasing or anything else. The question here is whether this woman committed perjury.

Tr. 68-69.

[61]Candelaria-Gonzalez is silent as to whether such curative instructions were given. For a case where the giving of instructions was a factor in finding no prejudice, see Duran v. United States, 9 Cir., 1969, 413 F.2d 596, 600.

conceded at oral argument that the Judge's behavior did not prevent him from conducting the defense as he ordinarily would have. Fourth, the defense was not the sole target of the Judge's dissatisfaction; the Court demonstrated some pique toward the government as well. See United States v. Bridges, 5 Cir., 1977, 551 F.2d 651; Duran v. United States, 9 Cir., 1969, 413 F.2d 596, 600. Fifth, and most significant, the acquittal of Abrams on Count I further negates any claim that the jury was affected by the Judge's allegedly biased attitude. United States v. Bridges, supra.

[15] While we do not condone a Trial Judge's disparagement of the advocates appearing before him, in the final analysis, the question whether prejudicial trial court conduct reaches constitutional magnitude is a matter of degree. In light of all the factors enumerated above, we do not believe that, standing alone, the court's handling of the trial so prejudiced the defense in the eyes of the jury as to warrant reversal on Fifth or Sixth Amendment grounds.

III. Failure To Grant Mistrial

[16] The government called as a witness Sgt. Paul Janowski who had assisted in executing the search warrant of Davis' office.[62] When asked by whom he was employed, Janowski responded, "Dade County Organized Crime Bureau." Defense counsel immediately objected and moved for a mistrial, stating that the answer was prejudicial. The motion was summarily denied.

[62]See note 6, supra

Abrams urges that this answer improperly permitted the jury to infer that she was in some way linked to organized crime or the Mafia, resulting in prejudice that requires reversal. Alternatively, appellant contends that the trial court's conduct, taken together with the denial of the mistrial motion, should result in reversal as in Candelaria-Gonzalez, supra.[63] We disagree.

Defense counsel conceded at oral argument before us that Janowski in fact worked for the Dade County Organized Crime Bureau. The answer was therefore truthful. Appellant also concedes that it is customary to have witnesses state where they are employed. In addition, we are compelled to ask one question: if the answer had in fact infected the jury in the manner suggested, why would it have acquitted Abrams on Count I? Moreover, the jury was instructed more than once that the sole issue before it was whether Abrams deliberately lied to the grand jury and that nothing she did in Davis' office by way of over- or undercharging a client was relevant. Another factor negating likely prejudice is the jury's possession during its deliberation of all Abrams' grand jury testimony in which there was not one shred of evidence linking Abrams or the Davis office to the Mafia or organized crime. The possibility that this one isolated answer — given in the context of the whole trial where there was not another word to show any connection to the syndicate — could cause a reasonable juror to jump to the conclusion that Abrams had any such connection is farfetched. We refuse to credit jurors with such active imaginations and so little common sense.

[63]See section II.

The Trial Judge did not abuse his discretion in denying the motion for a mistrial and the record, taken as a whole, fails to demonstrate that Abrams was denied a fair and impartial trial.

The conviction and sentence on Count II is affirmed. The conviction on Count III is reversed and a judgment of acquittal is to be entered on that count.

AFFIRMED IN PART and REVERSED IN PART.

APPENDIX

JULY 26, 1976 GRAND JURY TESTIMONY OF ANITA ABRAMS SET FORTH IN COUNT II OF THE INDICTMENT

Q.1 The message, according to the notation, says "Anita space Eva Henry costs space $231.50 space wants breakdown," and gives the case number.

Now, after you received this telephone message, did you obtain a breakdown of these costs?

A.1 Yes, I did.

Q.2 Where did you get that from?

A.2 From our cost sheet and the cards that the accountant would have.

Q.3 Now, what has been marked as page two of this item, which is a letter dated April 1, 1974, do you recognize that?

A.3 Yes, I do.

Q.4 Do your initials appear as the typist on this?

A.4 Yes.

Q.5 Attached to that is a breakdown of the costs on Eva Henry, is that correct?

A.5 Yes.

Q.6 Now, on this charge sheet, on Eva Henry, as attached to this letter to the Florida Bar list is, first of all, well it lists a number of minor charges such as $3 for accident report, $6 Westchester General Hospital medical records, Jackson Memorial Hospital medical records, I believe that's a total of $14 right there.

Then there's also a charge here for $35 for photographs.

Now, this request came in and this letter was sent out on April 1, 1974.

Do you recognize this copy of a bill which appeared in the Eva Henry file which is page number three of that exhibit which is a bill for film?

A.6 Yes, I do.

Q.7 Dated April 2, 1974.

Do you recognize that?

A.7 Yes, I do.

Q.8 Do you recall the circumstances under which that bill was obtained?

A.8 I know that the investigator, Dave Hallen, would take photographs and bill us for that.

Q.9 After the case was closed?

A.9 Well, sometimes a bill is not submitted until after the case is closed.

Q.10 But this is not a bill from Mr. Hallen.

This is a bill for film.

A.10 He would have paid that bill himself.

Q.11 He wouldn't have paid it until like a year after the case was closed?

A.11 No.

What I'm saying is he would pay it out of his own pocket and collect it from the office.

Q.12 When would he pay it?

A.12 When he gets it.

Q.13 Why he would be getting a bill for film on the Eva Henry case the day after the letter from the Florida Bar comes in asking for a breakdown on costs?

A.13 I wouldn't know what he would do.

All I know is that sometimes, before the case is — he would pay a bill before and submit it to us after.

Q.14 Now, this amount that you have here, $35 for photographs, which, apparently, is based on a bill for film and a copy of a cover envelope from the developing company also dated April 2, 1974, now these two amounts, which constitute the bill for $35 on photographs, where you would have gotten the bill for film or a bill for photographs prior to receiving these two items?

A.14 From Dave Hallen.

* * * * * *

Q.15 Isn't it true, Miss Abrams, that after you received a letter from the Florida Bar or a note from the Florida Bar asking for a breakdown of costs, that these items, the bill for film and the bill for photographs, were obtained the day after so that you would have something in your file to justify that cost?

A.15 Not to my knowledge.

Q.16 All right.

You said you did type up this letter to the Florida Bar, right?

A.16 Yes, I did.

Q.17 You did type up this charge sheet on Eva Henry?

A.17 Yes, I did.

Q.18 Where did you get the figures from this that appear on the charge sheet?

A.18 From what I have on my own charge sheets on what was on the charge cards.

Q.19 You didn't use the journal entries, then?

A.19 Not for the charge cards.

Q.20 No.

I didn't ask for the charge cards.

I asked for this letter.

I asked, what records did you use to prepare this charge sheet which was submitted to the Florida Bar on Eva Henry?

A.20 Well, I would get it from a charge sheet, like the one that's here on Valdez, and if there was a charge card that the accountant would have.

* * * * * *

Q.21 Now, listed on this charge sheet of Eva Henry is a charge of $107.50 for investigation in photography.

Now, where would you have gotten that amount from?

A.21 From Dave Hallen.

Q.22 Okay.

You didn't get it from Dave Hallen when the Florida Bar asked for a breakdown, did you?

A.22 Probably did.

I don't recall exactly when I got it from him.

Q.23 Your case was closed by then, right?

A.23 I don't remember exactly when it was closed and when there was a letter from the Florida Bar.

Q.24 This charge — closing statement that you referred to before has a listed cost on here of $231.50 and part of that cost is, supposedly, made up by this charge of Mr. Hallen for a hundred and seven dollars, is that right?

A.24 Yes.

Q.25 Now, when you prepared this, which was prepared prior to the time that Miss Henry made her request to the Florida Bar, where did you get the figure of a hundred and seven dollars from for investigative services?

A.25 Dave Hallen.

* * * * * *

Q.26 . . . Now this thing on Yva Henry here, on what has been marked as Government's Exhibit No. 9, which, first of all, contains a message of a phone call to you that we've gone over before, saying "Anita, Yva Henry, costs, $231.50, want breakdown," gives the case number is there a little notation off to the side here saying, "Photographs, ten at $3.50, $35 AR" which I assume is accident report, "$3, WR," which I assume is Westchester report, "$6, JMH," which I assume is Jackson Memorial Hospital, "$5."

Giving us a total of $49.

Then underneath that is another entry for $75 giving us a total entry of $124.

Then underneath that, Miss Abrams, is another entry wherein you put down the amount of costs, $231.50 and you subtract that amount you have up here, $124 to arrive at another figure.

Could you please tell me what you were doing there?

A.26 It looks like I was subtracting $124 from $231.50.

Q.27 Why would you be doing that?

You testified, when you made up the amount of costs, you would just go to these various places and get all the costs and add them up and arrive at a cost.

Why would you be subtracting $124 from what the total cost is listed on the sheet?

Why wouldn't you be adding up all the costs?

A.27 Well, I don't remember.

I don't know what I was doing.

I can't remember what I was doing there.

I can see I was subtracting that but I don't know why.

I can't remember what I was doing.

Q.28 You can't explain this?

A.28 I know I did subtract it.

Q.29 You're the bookkeeper.

Can you think of any reason you would be doing it that way?

A.29 I really don't remember.

I know I was subtracting it but—

* * * * * *

Q.30 (By Ms. Lyons) So you're saying Mr. Hallen brought this bill into your office; is that right?

A.30 I think he did.

* * * * * *

Q.31 Now, this is a bill for services dated May 17, 1973.

Now it's listed in the name of Worldwide Detective Agency.

Who would the check have been made to?

A.31 Dave Hallen.

Q.32 Were all bills from Worldwide Detective Agency paid to Dave Hallen directly?

A.32 Yes.

* * * * * *

Q.33 (By Ms. Lyons) Miss Abrams, when you got this request from the Florida Bar for a breakdown on the Yva Henry case, isn't it true that you went back through your books to try and find the check that had been written to someone in an amount you could fill in the blanks on this and thus justify the cost of $131.50?

A.33 No, I did not.

* * * * * *

Q.34 When you figured out the cost, how did you figure out this entry, or whatever it is, in this book, or in this book, that $107.50 of that was attributable to investigation and Yva Henry when it doesn't say $107.50 is for Dave Hallen?

A.34 Because his sheet would have it.

Dave Hallen has always — almost always supplies bills for his services and he would have cases on that sheet.

I would post it accordingly as such.

Q.35 Post it where?

A.35 On the chart sheet.

Q.36 So you're saying that you prepared this amount for the Florida Bar based upon your charge sheet in the Yva Henry case?

A.36 Yes.

* * * * * *

Q.37 Why wouldn't you have these bills in your file until April 2, 1974 and why wouldn't the cost be incurred until April 2, 1974 if his investigation was allegedly done in May of 1973?

Didn't you direct to have these photographs prepared at that time when this inquiry from the Florida Bar come about?

A.37 I didn't.

I never directed Dave Hallen to do anything, the attorneys would.

Q.38 Did the attorney do that in this case?

A.38 Not to my knowledge, no.

Q.39 Didn't these bills just appear in the file after that call from the Florida Bar?

A.39 I know that the bills were Dave Hallen's.

He had them.

I never paid them directly.

He may have requested copies.

Q.40 Where did this come from?

A.40 It would come from him.

Q.41 In April of 1974, the day after the request from the Florida Bar?

A.41 Well, I don't know where we got them or when he got them but he may have asked for copies of the bills.

He may not have kept them.

He may have requested copies of the bills the—

Q.42 You said he submitted the bills to you and that you based your payments to him on bills he submitted to you.

Why would he have been requesting copies of bills from you?

A.42 Not from me, from the photography company.

Q.43 Why would it be in your file?

A.43 He may have been asked to produce the bills.

Q.44 By who?

A.44 By the attorney.

Q.45 What attorney?

A.45 I don't know who worked on the file or gave instructions on it.

Q.46 Mr. Davis is the one signing the letter to the Florida Bar with the breakdown of costs?

A.46 Yes.

Q.47 This breakdown of costs was prepared by you, is that correct?

A.47 Yes.

Q.48 And you said that those costs all came from the cost statement that you had prepared as this case went along?

A.48 That's right.

Q.49 All right.

This breakdown of costs to the Florida Bar, then, you deny was based on these photographic bills which did not come into your office until April of 1974?

A.49 I don't understand.

What's the question.

Q.50 You're saying that the breakdown to the Florida Bar was based purely on your cost statement?

A.50 Yes.

Q.51 And you said that you recorded costs on your cost statement as they were incurred?

A.51 Yes.

Q.52 Therefore the cost statement would not contain any bills such as these which were not submitted into your office until April 2, 1974.

A.52 What I'm saying is that Mr. Hallen may have paid them and we repaid him and he may have requested copies of the bills because we didn't have those to substantiate his payment.

The payment that he received.

He may have got it after.

I don't know.

I don't remember the exact circumstances.

Q.53 You do not know the circumstances under which this photographic bill, dated April 2, 1974, and this envelope containing negatives of photographs dated April 2, 1974, and contained in the Yva Henry file, you

do not know the circumstances under which these items were contained?

A.53 No.

I do not.

Q.54 Also the bill for the conference with Dr. Fox, two conferences with Dr. Fox in April of 1973 and in June of 1973, do you also deny that you know the circumstances under which this particular bill was prepared?

A.54 I do.

Q.55 Also this bill from Worldwide Detective Agency dated May 17, 1973, in the amount of $107.50.

Do you know the circumstances under which this bill was prepared.

A.55 I know that bill was prepared by the investigator and it was paid to him.

Q.56 When?

A.56 I don't know.

Q.57 Would that bill have been submitted on/or about May 17, 1973?

A.57 It's possible but I cannot say for sure.

Q.58 Would it have been submitted prior to the time that this amount was deducted from the client's settlement payment?

A.58 I do not remember when it was submitted.

I know it was submitted and paid but I cannot remember when or what day or what.

Q.59 Would you have charged the client for this amount if you did not have a bill on it?

A.59 No.

Q.60 You're saying this bill was submitted to your office sometime prior to the settlement in the Yva Henry case?

A.60 Yeah.

APPENDIX B

INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

NO. 76-394-Cr-CA
18 USC 1623
$10,000 - 5 years

[FILED Aug 20 1976]

UNITED STATES OF AMERICA

v.

ANITA ABRAMS

The Grand Jury charges that:

COUNT I

1. On or about May 21, 1976, at Miami, Dade County, in the Southern District of Florida, the defendant,

ANITA ABRAMS,

while under oath as a witness before Federal Grand Jury Number 76-2(MIA) knowingly did make a false material declaration, that is to say:

2. At the time and place aforesaid, the Federal Grand Jury was conducting an investigation into

various allegations stemming from insurance claims filed by the law offices of James A. Davis, II, on behalf of persons involved in vehicular accidents who had received medical treatment from Dr. M.S. Fox and/or Westchester Hospital.

3. It was a matter material to said investigation to determine from these accident victims how they had been referred to James A. Davis, II, Dr. M.S. Fox and Westchester Hospital.

4. It was also a matter material to said investigation to determine if any attempt had been made to instruct the accident victims to conceal or mislead anyone inquiring about the identity of those making such referrals.

5. At the time and place aforesaid, Anita Abrams, while under oath, did knowingly declare before said Federal Grand Jury with respect to the aforesaid material matter as follows:

Q. I'd like to call your attention to a time in 1973, I believe it was, probably mid-1973 when Mr. Davis was under pressure from the local news media and from the State's Attorney's Office for a possible investigation into his practices and ask you whether or not you received any instructions at that time to contact former clients of Mr. Davis'?

A. I don't recall what year it was that he had us call the client's in and talk to them.

I don't recall what year it was or exactly what it was that was said.

Q. When he gave you these instructions, what was the gist of what he told you to do?

A. I think it was something like to be careful about the, you know, about what they say to anyone, something along those lines.

I can't remember exactly what it was.

It was something to do with that effect . . .

* * * *

Q. Were you told to instruct them as to what they should say as to how they were referred to Mr. Davis' office?

A. No. I wasn't told this by Mr. Davis.

Q. Who were you told this by?

A. (No response.)

Q. Who were you told this by?

A. I wasn't told.

Q. You were given instructions by Mr. Davis but that's not what you were told?

A. That's not what I was told, no.

Q. You were told to tell the clients that they didn't remember how they happened to choose Mr. Davis as an attorney?

A. No.

I never said that.

Q. Were you told to say that?

A. No.

Q. Were you told to tell the clients that a friend brought them to the office?

A. No.

Q. Were you told to tell the clients that they don't remember how they happened to choose Dr. Fox?

A. No.

I never said that.

Q. Were you told to tell them a friend referred them to Dr. Fox?

A. No.

I was never told that.

I never said that to a client.

Q. So what, exactly did you say to the client?

A. Don't make a statement like that, you know, not to do this or about Dr. Fox or anything like that, who brought them in or who referred them but I do remember something like they should be careful about what they say to people.

Q. What people?

A. Anybody who questions them about their case because it may be harmful to their case . . .

* * *

6. The aforesaid testimony of Anita Abrams, as she then and there well knew and believed, was false in that, on or about September, 1973, Anita Abrams was present at a meeting called by James A. Davis, II, in which he instructed office personnel to tell clients that if they were asked by investigators how they had been referred to him or Dr. M.S. Fox that they were to say that a friend sent them; all in violation of Title 18, United States Code, Section 1623.

COUNT II

1. On or about July 26, 1976, at Miami, Dade County, in the Southern District of Florida, the defendant,

ANITA ABRAMS,

while under oath as a witness before Federal Grand Jury Number 76-2(MIA) knowingly did make a false material declaration, that is to say:

2. At the time and place aforesaid the Federal Grand Jury was conducting an investigation into various allegations stemming from insurance claims filed by the law offices of James A. Davis, II. These claims for damages were made on behalf of people involved in vehicular accidents who were represented by the Davis law firm. Settlements of accident claims would be negotiated by personnel at Davis' office and insurance drafts would be issued jointly to the client and James A. Davis, II. Payment would be made by Davis' office to the accident victim based on the amount of settlement after deducting attorney's fees, medical expenses and miscellaneous costs.

3. It was a matter material to said investigation to determine whether the expenses and costs deducted were actually incurred.

4. At the time and place aforesaid, Anita Abrams, while under oath, did knowingly declare before said Federal Grand Jury with respect to the aforesaid material matter, as follows:

Q. The message, according to the notation, says "Anita space Eva Henry costs space $231.50 space wants breakdown," and gives the case number.

Now, after you received this telephone message, did you obtain a breakdown of these costs?

A. Yes, I did.

Q. Where did you get that from?

A. From our cost sheet and the cards that the accountant would have.

Q. Now, what has been marked as page two of this item, which is a letter dated April 1, 1974, do you recognize that?

A. Yes, I do.

Q. Do your initials appear as the typist on this?

A. Yes.

Q. Attached to that is a breakdown of the costs on Eva Henry, is that correct?

A. Yes.

Q. Now, on this charge sheet, on Eva Henry, as attached to this letter to the Florida Bar list is, first of all, well it lists a number of minor charges such as $3 for accident report, $6 Westchester General Hospital medical records, Jackson Memorial Hospital medical records, I believe that's a total of $14 right there.

Then there's also a charge here for $35 for photographs.

Now, this request came in and this letter was sent out on April 1, 1974.

Do you recognize this copy of a bill which appeared in the Eva Henry file which is page

number three of that exhibit which is a bill for film?

A. Yes, I do.

Q. Dated April 2, 1974.

Do you recognize that?

A. Yes, I do.

Q. Do you recall the circumstances under which that bill was obtained?

A. I know that the investigator, Dave Hallen, would take photographs and bill us for that.

Q. After the case was closed?

A. Well, sometimes a bill is not submitted until after the case is closed.

Q. But this is not a bill from Mr. Hallen.

This is a bill for film.

A. He would have paid that bill himself.

Q. He wouldn't have paid it until like a year after the case was closed?

A. No.

What I'm saying is he would pay it out of his own pocket and collect it from the office.

Q. When would he pay it?

A. When he gets it.

Q. Why he would be getting a bill for film on the Eva Henry case the day after the letter from the Florida Bar comes in asking for a breakdown on costs?

A. I wouldn't know what he would do.

All I know is that sometimes, before the case is — he would pay a bill before and submit it to us after.

Q. Now, this amount that you have here, $35 for photographs, which, apparently, is based on a bill for film and a copy of a cover envelope from the developing company also dated April 2, 1974, now these two amounts, which constitute the bill for $35 on photographs, where you would have gotten the bill for film or a bill for photographs prior to receiving these two items?

A. From Dave Hallen . . .

* * * *

Q. Isn't it true, Miss Abrams, that after you received a letter from the Florida Bar or a note from the Florida Bar asking for a

breakdown of costs, that these items, the bill for film and the bill for photographs, were obtained the day after so that you would have something in your file to justify that cost?

A. Not to my knowledge.

Q. All right.

You said you did type up this letter to the Florida Bar, right?

A. Yes, I did.

Q. You did type up this charge sheet on Eva Henry?

A. Yes, I did.

Q. Where did you get the figures from this that appear on the charge sheet?

A. From what I have on my own charge sheets on what was on the charge cards.

Q. You didn't use the journal entries, then?

A. Not for the charge cards.

Q. No.

I didn't ask for the charge cards.

I asked for this letter.

I asked, what records did you use to prepare this charge sheet which was submitted to the Florida Bar on Eva Henry?

A. Well, I would get it from a charge sheet, like the one that's here on Valdez, and if there was a charge card that the accountant would have . . .

* * * *

Q. Now, listed on this charge sheet of Eva Henry is a charge of $107.50 for investigation in photography.

Now, where would you have gotten that amount from?

A. From Dave Hallen.

Q. Okay.

You didn't get it from Dave Hallen when the Florida Bar asked for a breakdown, did you?

A. Probably did.

I don't recall exactly when I got it from him.

Q. Your case was closed by then, right?

A. I don't remember exactly when it was closed and when there was a letter from the Florida Bar.

Q. This charge — closing statement that you referred to before has a listed cost on here of $231.50 and part of that cost is, supposedly, made up by this charge of Mr. Hallen for a hundred and seven dollars, is that right?

A. Yes.

Q. Now, when you prepared this, which was prepared prior to the time that Miss Henry made her request to the Florida Bar, where did you get the figure of a hundred and seven dollars from for investigative services?

A. Dave Hallen . . .

* * * *

Q. . . . Now this thing on Yva Henry here, on what has been marked as Government's Exhibit No. 9, which, first of all, contains a message of a phone call to you that we've gone over before, saying, "Anita, Yva Henry, costs, $231.50, want breakdown," gives the case number, is there a little notation off to the side here saying, "Photographs, ten at $3.50, $35 AR" which I assume is accident report, "$3, WR," which I assume is Westchester report, "$6, JMH," which I assume is Jackson Memorial Hospital, "$5."

Giving us a total of $49.

Then underneath that is another entry for $75 giving us a total entry of $124.

Then underneath that, Miss Abrams, is another entry wherein you put down the amount of costs, $231.50 and you subtract that amount you have up here, $124 to arrive at another figure.

Could you please tell me what you were doing there?

A. It looks like I was subtracting $124 from $231.50.

Q. Why would you be doing that?

You testified, when you made up the amount of costs, you would just go to these various places and get all the costs and add them up and arrive at a cost.

Why would you be subtracting $124 from what the total cost is listed on the sheet?

Why wouldn't you be adding up all the costs?

A. Well, I don't remember.

I don't know what I was doing.

I can't remember what I was doing there.

I can see I was subtracting that but I don't know why.

I can't remember what I was doing.

Q. You can't explain this?

A. I know I did subtract it.

Q. You're the bookkeeper.

Can you think of any reason you would be doing it that way?

A. I really don't remember.

I know I was subtracting it but— . . .

* * * *

Q. (By Ms. Lyons) So you're saying Mr. Hallen brought this bill into your office; is that right?

A. I think he did . . .

* * * *

Q. Now, this is a bill for services dated May 17, 1973.

Now it's listed in the name of Worldwide Detective Agency.

Who would the check have been made to?

A. Dave Hallen.

Q. Were all bills from Worldwide Detective Agency paid to Dave Hallen directly?

A. Yes . . .

* * * *

Q. (By Ms. Lyons) Miss Abrams, when you got this request from the Florida Bar for a breakdown on the Yva Henry case, isn't it true that you went back through your books to try and find the check that had been written to someone in an amount you could fill in the blanks on this and thus justify the cost of $131.50?

A. No, I did not . . .

* * * *

Q. When you figured out the cost, how did you figure out this entry, or whatever it is, in this book, or in this book, that $107.50 of that was attributable to investigation and Yva Henry when it doesn't say $107.50 is for Dave Hallen?

A. Because his sheet would have it.

Dave Hallen has always — almost always supplies bills for his services and he would have cases on that sheet.

I would post it accordingly as such.

Q. Post it where?

A. On the chart sheet.

Q. So you're saying that you prepared this amount for the Florida Bar based upon your charge sheet in the Yva Henry case?

A. Yes . . .

* * * *

Q. Why wouldn't you have these bills in your file until April 2, 1974 and why wouldn't the cost be incurred until April 2, 1974 if his investigation was allegedly done in May of 1973?

Didn't you direct to have these photographs prepared at that time when this inquiry from the Florida Bar come about?

A. I didn't.

I never directed Dave Hallen to do anything, the attorneys would.

Q. Did the attorney do that in this case?

A. Not to my knowledge, no.

Q. Didn't these bills just appear in the file after that call from the Florida Bar?

A. I know that the bills were Dave Hallen's.

He had them.

I never paid them directly.

He may have requested copies.

Q. Where did this come from?

A. It would come from him.

Q. In April of 1974, the day after the request from the Florida Bar?

A. Well, I don't know where we got them or when he got them but he may have asked for copies of the bills.

He may not have kept them.

He may have requested copies of the bills the—

Q. You said he submitted the bills to you and that you based your payments to him on bills he submitted to you.

Why would he have been requesting copies of bills from you?

A. Not from me, from the photography company.

Q. Why would it be in your file?

A. He may have been asked to produce the bills.

Q. By who?

A. By the attorney.

Q. What attorney?

A. I don't know who worked on the file or gave instructions on it.

Q. Mr. Davis is the one signing the letter to the Florida Bar with the breakdown of costs?

A. Yes.

Q. This breakdown of costs was prepared by you, is that correct?

A. Yes.

Q. And you said that those costs all came from the cost statement that you had prepared as this case went along?

A. That's right.

Q. All right.

This breakdown of costs to the Florida Bar, then, you deny was based on these photographic bills which did not come into your office until April of 1974?

A. I don't understand.

What's the question.

Q. You're saying that the breakdown to the Florida Bar was based purely on your cost statement?

A. Yes.

Q. And you said that you recorded costs on your cost statement as they were incurred?

A. Yes.

Q. Therefore the cost statement would not contain any bills such as these which were not submitted into your office until April 2, 1974.

A. What I'm saying is that Mr. Hallen may have paid them and we repaid him and he may have requested copies of the bills because we didn't have those to substantiate his payment.

The payment that he received.

He may have got it after.

I don't know.

I don't remember the exact circumstances.

Q. You do not know the circumstances under which this photographic bill, dated April 2, 1974, and this envelope containing negatives of photographs dated April 2, 1974, and contained in the Yva Henry file, you do not know

the circumstances under which these items were contained?

A. No.

I do not.

Q. Also the bill for the conference with Dr. Fox, two conferences with Dr. Fox in April of 1973 and in June of 1973, do you also deny that you know the circumstances under which this particular bill was prepared?

A. I do.

Q. Also this bill from Worldwide Detective Agency dated May 17, 1973, in the amount of $107.50.

Do you know the circumstances under which this bill was prepared.

A. I know that bill was prepared by the investigator and it was paid to him.

Q. When?

A. I don't know.

Q. Would that bill have been submitted on/or about May 17, 1973?

A. It's possible but I cannot say for sure.

Q. Would it have been submitted prior to the time that this amount was deducted from the client's settlement payment?

A. I do not remember when it was submitted.

I know it was submitted and paid but I cannot remember when or what day or what.

Q. Would you have charged the client for this amount if you did not have a bill on it?

A. No.

Q. You're saying this bill was submitted to your office sometime prior to the settlement in the Yva Henry case?

A. Yeah . . .

* * * *

5. The aforesaid testimony of Anita Abrams, as she then and there well knew and believed, was false in that, on or about April 2, 1974, Anita Abrams did knowingly prepare an itemized list of costs for the Florida Bar which did not accurately reflect the costs incurred; all in violation of Title 18, United States Code, Section 1623.

COUNT III

The Grand Jury realleges each of the allegations contained in paragraphs 1, 2 and 3 of Count II of the indictment and further alleges:

4. At the time and place aforesaid,

ANITA ABRAMS,

while under oath did knowingly declare before said Federal Grand Jury with respect to the aforesaid material matter as follows:

Q. Now, looking at Grand Jury Exhibit No. 2, do you recognize the handwriting?

A. Yes.

Q. Whose handwriting is that?

A. Mine.

Q. All that handwriting?

A. Yes.

Q. You have depositions listed there.

A. Yes.

Q. That's your handwriting, also?

A. Yes.

Q. In cases when you charge for a deposition like that did the particular client have a deposition taken?

A. Yes.

Q. And they would be — would you have somebody, a court reporter there to take down what they said?

A. I wouldn't be aware — I wouldn't be there when the court reporter was there.

Q. But there would be a cost?

A. Yes.

Q. Who would give you that cost?

How would you know what to charge for a particular item like that?

A. I would get a bill.

Q. From whom?

A. From the court reporter.

Q. Then you'd take that bill.

On the bill would it say the deposition or the particular work that was done on that?

A. Yes.

5. The aforesaid testimony of Anita Abrams as she then and there well knew and believed, was false in that she had prepared the charge sheet in case number 5469 on Eduardo Valdez which reflects that check number 1897 dated May 19, 1975 in the amount of $80.00 was paid to Jack Besoner and Associates for court reporter costs which she knew did not accurately reflect the costs; all in violation of Title 18, United States Code, Section 1623.

A TRUE BILL

/s/ Thomas E. Thornton
FOREMAN

ROBERT W. RUST
UNITED STATES ATTORNEY

By: /s/ Marsha L. Lyons
MARSHA L. LYONS
Assistant United States Attorney

APPENDIX C

Constitutional and Statutory Provisions Involved.

1. Constitutional:

AMENDMENT V

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy or life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18 U.S.C. §1623 provides in pertinent part:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

Supreme Court, U. S.
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MAY 26 1978
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No. 77-1397

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANITA ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-56) is reported at 568 F.2d 411.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1978. The petition for a writ of

certiorari was filed on March 27, 1978 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's false testimony before a federal grand jury was sufficiently material to the grand jury's investigation to support her conviction for perjury.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts of making material false statements before a federal grand jury, in violation of 18 U.S.C. 1623.[1] On Count II, petitioner was sentenced to 18 months' imprisonment and a fine of $1,000. On Count III, she was placed on three years' probation, which was to run consecutively to the sentence on Count II. In a comprehensive opinion, the court of appeals affirmed petitioner's conviction on Count II but reversed on Count III (Pet. App. 1-56).

The facts are not in dispute. In 1976 a federal grand jury sitting in the Southern District of Florida was investigating a series of insurance claims filed by the law offices of James A. Davis for clients who had received medical treatment from Doctor M. S. Fox or

[1] Petitioner was acquitted on Count I of the indictment and convicted on Counts II and III.

Westchester Hospital or both (Pet. App. 8). Petitioner, who worked as a secretary and bookkeeper in Davis's office (Tr. 127), was subpoenaed by the grand jury and was granted use immunity (Pet. App. 8).

During her appearance before the grand jury on July 26, 1976, petitioner was questioned extensively about a previous Florida Bar Association investigation of a cost breakdown that had been prepared by Davis's office for one of his clients (Pet. App. 42-56). In March of 1974, the client had complained to the Florida Bar Association about the amount she was to receive in settlement of her claim for an accident (Tr. 67). Upon inquiry by the Bar Association, petitioner signed a letter for Davis containing a "closing statement" on the case, which recited a $231.50 charge for "costs" (Tr. 66-67). The Bar Association subsequently requested that Davis itemize the $231.50 in costs (Tr. 133). In response to that request, petitioner signed a letter to the Bar Association on behalf of Davis, enclosing a putative breakdown of the costs (Tr. 133-134).[2]

Petitioner testified before the grand jury that the $231.50 figure was based on bills actually in the file prior to the settlement of the case, or on the cost sheet she prepared as the case progressed, or on cost cards maintained by the accountant (Pet. App. 42, 46, 51, 53, 54). In fact, as petitioner was aware, the cost

[2] The itemized costs included, among others, $75 for conferences with Doctor M. S. Fox, $107.50 for investigation and photography, and $35 for photographs (Pet. App. 10).

sheet had been totally fabricated (Tr. 84-85, 94-95, 119; Pet. App. 10-11, 14).

Petitioner was subsequently indicted for perjury in connection with her testimony before the grand jury. A week later, the grand jury returned an indictment against Davis and Fox, charging them with 105 counts of mail fraud.

ARGUMENT

Petitioner's false statements were plainly material. As the indictment alleged (Pet. App. 62), the grand jury was conducting an investigation into insurance claims filed by Davis's law office on behalf of clients. Settlement of these accident claims would be negotiated by Davis's office, and insurance drafts would issue, made out jointly to the client and Davis. After deducting attorneys' fees, medical expenses, and other costs, Davis's office would pay the remainder to the client (*ibid.*). Whether the expenses and costs deducted were actually incurred was therefore one of the main issues of the investigation. Petitioner's false testimony, in which she sought to justify the cost breakdown in one such case, and in which she concealed the fact that the costs had been fabricated, therefore went to the heart of the grand jury's inquiry. Her argument that her false testimony was not material to the grand jury's inquiry is, as the court of appeals characterized it, "frivolous" (Pet. App. 27).

Petitioner nonetheless contends (Pet. 8-10) that there is a conflict between the Eighth and the Fifth Circuits as to the proper definition of materiality for the purposes of 18 U.S.C. 1623. Under the Fifth Circuit's standard, testimony is deemed material if it is capable of influencing the grand jury on the issue before it, or if it would have the natural effect or tendency to influence, impede or dissuade the grand jury from pursuing its investigation. *United States* v. *Brumley*, 560 F.2d 1268, 1275 (C.A. 5); *United States* v. *Saenz*, 511 F.2d 766 (C.A. 5), certiorari denied, 423 U.S. 946; *United States* v. *Makris*, 483 F.2d 1082, 1088 (C.A. 5), certiorari denied, 415 U.S. 914; *United States* v. *Gremillion*, 464 F.2d 901 (C.A. 5), certiorari denied, 409 U.S. 1085. The Eighth Circuit states the test of materiality as whether the false declaration tends to influence, mislead, or hamper the grand jury's investigation of a matter within its authority to investigate. *United States* v. *Lasater*, 535 F.2d 1041, 1047 (C.A. 8); *United States* v. *Koonce*, 485 F.2d 374, 380 (C.A. 8). Although petitioner argues that there is a critical distinction between these two standards, we submit that they are virtually indistinguishable. Neither of the two Eighth Circuit cases on which petitioner relies suggests otherwise.

In *United States* v. *Koonce*, *supra*, the court held that the government had not introduced sufficient evidence to show that the false statement in the case was material to the grand jury's investigation, although the court declined to rule that the false state-

ment was immaterial as a matter of law. The statement at issue in that case was the defendant's false testimony about a boat that had been stolen some six years earlier. The court noted that the government had failed to introduce any evidence, other than the transcript of the defendant's grand jury testimony, to support its allegation that the false statement was material to the grand jury's inquiry. Since the transcript did not in any way indicate how the defendant's statement about the stolen boat was material,[3] the court held the evidence insufficient to support the defendant's conviction.

In this case, by contrast, as the court of appeals held (Pet. App. 27-28), the transcript of petitioner's three grand jury appearances made it clear that the grand jury was conducting an investigation of matters directly related to petitioner's false statements.

In *United States* v. *Lasater*, *supra*, the grand jury was conducting an investigation into the affairs of a former Missouri governor. One subject of the grand jury's inquiry was possible tax violations arising from transactions in a bank account maintained for the governor's benefit. The defendant was the president of a trust company that arranged the purchase and sale of municipal bonds, the proceeds of which were deposited into the bank account. The court noted

[3] The court noted that the statute of limitations for the state offense of stealing the boat had already run. The grand jury was apparently investigating possible tax offenses against the defendant, but that fact was not reflected in the record at trial (485 F.2d at 381).

that the defendant had acknowledged that the trust company was involved in the affair, with the purpose of currying favor with the governor. In the course of his testimony, however, the defendant had allegedly made false statements in which he minimized his role in the affair. The court held that these false statements were not material. While the defendant's false testimony as to the extent of his personal involvement in the transaction would clearly have been material to an investigation of *his* actions, the court found that it was not material to the investigation of the governor. In this context the court noted that the "perjury statute [should not] be invoked where the alleged misstatement relates only to a peripheral matter * * *." 535 F.2d at 1049.

Again, there is nothing in this case or other Fifth Circuit cases to suggest that the Fifth Circuit would reach a different conclusion on the same facts. Petitioner's false statements related not only to her own misconduct, but to fraudulent conduct in Davis's handling of payments to an accident victim, precisely the subject of the grand jury's investigation and the subsequent indictment of Davis and Fox.[4]

[4] The indictment charged that Davis and Fox had devised a scheme to defraud various insurance carriers, accident victims, and the Florida Bar Association. It alleged that the objects of the scheme included reducing payments to accident victims by deducting false and inflated medical bills and costs from the total amount of their settlement, and preventing the Florida Bar Association from conducting legitimate inquiries concerning the handling of accident claims by preparing and submitting false and inflated cost justifications (Pet. App. 26 n. 49).

Finally, petitioner suggests (Pet. 9) that in order for false testimony to influence, mislead, or hamper an investigation, it must deter the grand jury from completing its task. As the court below correctly stated (Pet. App. 27), "[t]he government need not show that because of the perjured testimony, the grand jury threw in the towel. Actual impediment of the investigation is not required. *E.g., United States* v. *Makris, supra; United States* v. *Gremillion, supra.*" See also *United States* v. *Howard*, 560 F.2d 281, 284 (C.A. 7); *United States* v. *Kelly*, 540 F.2d 990, 993 (C.A. 9), certiorari denied, 429 U.S. 1040.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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